STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL CHRISTOPHER FREDERICK,

Defendant-Appellant.

_____/

Michigan Supreme Court
No. 153115

Court of Appeals
No. 323642

Kent County Circuit Court
No. 14-003216-FH

PLAINTIFF-APPELLEE'S ANSWER IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN SUPREME COURT

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Now comes the Plaintiff, the People of the State of Michigan, by James K. Benison, Chief Appellate Attorney, and in opposition to the Defendant-Appellant's Application for Leave to Appeal, argues as follows:

Defendant argues that this Court should grant leave because the majority opinion of the Court of Appeals misinterpreted the scope of the remand order, and that its ultimate decision on the constitutionality of the knock and talk procedure as applied to the facts of this case was wrong. Because the Court fully analyzed the constitutional arguments put forth by Defendant, and because its decision to reject the sweeping rewrite of constitutional principles put forth by Defendant was proper, this Court should deny leave to appeal.

Most of the substantive arguments of the People were encompassed in its responsive brief in the Court of Appeals, and therefore a copy of that document has been attached and is incorporated by reference.[1] The People also adopt the rationale of the trial court, and the majority opinion of the Court of Appeals to the extent those arguments expand upon that offered by the People.

To the extent that the People have any additional arguments to make in answer to the application for leave to appeal, the People first note that Defendant fails to afford the trial court's factual determinations the deference required under the clearly erroneous standard as mandated by MCR 2.613(C). For example, he states that Lt. Roetman "'forcefully' asked Frederick about his medical marihuana card and the marihuana butter" (Def's Application for Leave to Appeal, 3 [citing Defendant's own testimony at the evidentiary hearing]), in an effort to further his argument that his consent was coerced, but the trial court's finding of fact, after hearing the testimony of all

[1] Because the Court of Appeals had ordered this case consolidated with *People v Todd Van Doorne*, Court of Appeals Docket Number 323643, by order dated April 23, 2015, the People's brief filed in the Court of Appeals addresses both cases.

the witnesses, was that the investigating officers "never told Mr. Frederick that he was required to sign anything or used any other type of force, threat, or coercion to get him to cooperate with this investigation" (Trial Court's Opinion and Order, 3).

More problematic, however, is Defendant's principal argument, that *Florida v Jardines*, ___ US ___; 133 SCt 1409; 185 LEd2d 495 (2013), adds a bright-line rule that contact with a citizen outside of daylight hours is per se so unreasonable that it violates the Fourth Amendment, even in the absence of a search or seizure. As the People acknowledged below, the time of a knock and talk certainly might be a factor for a court to consider in an appropriate case for its bearing on the voluntariness of any consent, such as if there was evidence the police deliberately waited until 4 a.m. to approach a person's home for the purpose of disorienting the homeowner.[2] Such was not the case, here, however. As the Court of Appeals noted in its opinion, in this case, the police developed probable cause to execute a search warrant at the home of Tim Scherzer, which they were able to do at approximately 10:15 p.m. on March 17, 2014. *People v Frederick*. ___ Mich App ___; ___ NW2d ___ (Docket Nos. 323642 and 323643; Decided December 8, 2015; Slip op at 2). Based on information that Mr. Scherzer had given 14 pounds of marijuana butter to a corrections officer, Timothy Bernhardt, who was then to distribute this marihuana butter to other deputies, including Defendant, the police then did a series of knock and talk encounters (*Id.*). Mr. Bernhardt had told the members of KANET to whom he had recently distributed marijuana butter, and the police then went from one house to the next to the next (7-2-14 Tr, 35-36). There is no viable claim in the record that the police deliberately used the time as a factor in their search.

[2] Obviously, the time of the encounter is relevant to the trial court's evaluation of whether any subsequent consent was voluntary given. In this case, however, the trial court specifically found that Defendant "was lucid during this time and participating appropriately in his conversation with KANET members" and therefore Defendant "gave both the consent [to search] and waiver [of *Miranda* rights] freely, voluntarily, knowingly, and intelligently" (Circuit Court Opinion and Order, 10).

To the extent that time was a factor, it was based on the assessment of the officers that "[i]f we execute a search warrant in the day and the investigation leads us on, typically, we'll just keep going with it, because if we didn't make contact at 1 in the morning, there's a good chance with the phone tree that someone might find out we were at another house. We might potentially lose evidence. So yes. Typically, we start from 'A' in an investigation and go all the way through" (6/30/14 Tr, Testimony of Detective John Tuinhoff, 33-34). The detective repeated this sentiment later: "We were just following up. We did a search warrant, additional names came up, and to prevent the loss of possible evidence or statements, we decided to go to these different houses" (*Id.*, 36). Additionally, as Sgt. Kaechle testified, a knock and talk is done when "[y]ou may not have enough information at hand to get a search warrant, but instead you go to the home and try to meet up with the individual and knock on the door and try to talk to the individual, to allow us into the home and to allow us to further our investigation by either talking to us and making a statement or clearing them self up [sic]" (*Id.*, Testimony of Sgt. Nicholas Kaechle, 88). Lt. Al Roetman also verified that the nature of the investigation dictates the protocol to be used and the timing: "We ran this case just like we run any other case. Just because it hits the stroke of midnight doesn't mean our case stops and we don't keep going to people's homes, whether it's a marijuana case or an armed robbery. If it's an armed robbery we're investigating and we have additional leads from one location to another, we continue that investigation until it stops, whether it takes 24 hours or 6 hours or 4 days" (7-2-14 Tr, Testimony of Lt. Al Roetman, 16-17). When it was suggested that the vice team could have followed up the next day, Lt. Roetman was clear: "I disagree with that. That's not the way we conduct business" (*Id.*, 17). When called by the defense, Sheriff Lawrence Stelma testified that he did not instruct the vice unit on the specifics of how to handle the case, but instead told the chief deputy that the vice unit should handle the case the same

way they would handle a case with anyone else (*Id.*, 79). When the sheriff was asked if the investigation could have waited until the next day, he replied, "Probably not" (*Id.*). In explaining why, he said, "if I were an investigator, I would consider the potential for the destruction or removal of evidence as an important issue here and there is an immediacy to it, yes" (*Id.*, 80). Despite the holding of the courts below and the extensive testimony quoted above, Defendant asserts in his Application for Leave to Appeal to this Court that there was "no reason the citizen contact could not have waited until a reasonable hour" (Def's Application, v). Defendant's refusal to even acknowledge the testimony presented on why a knock and talk procedure was appropriate to be done as the evidence led them in this case, including the potential for the loss of evidence or delaying clearing a person's name, helps this Court understand why this case is not appropriate for further review. With the facts as they were actually presented at the evidentiary hearing and found by the trial court, Defendant's argument lacks merit.

Further, there is no indication in this case that the police abused the knock and talk option. Lt. Roetman clearly articulated the parameters for a knock and talk: "They can say, no, I don't want to talk to you. Then we go away" (7-2-14, 22). Had Defendant refused to speak with the vice officers, as was his right, the vice unit would have had to leave and then decide if they actually had probable cause for a search warrant, or how they were otherwise going to pursue their investigation. Defendant was advised of his rights under *Miranda,* and he was given a consent to search form that said he did not need to do so. As the trial court properly found, this was not a search or seizure prior to voluntary consent to search having been granted, and, as such, the Fourth Amendment is not implicated.

Additionally, while the People, by having charged Defendant, obviously believe that Defendant engaged in criminal activity, Defendant did not think he had done anything wrong (7-

14-14 Tr, 33), and thus there is no reason to suspect he would have declined to give consent whether the police arrived with one officer or seven, at 4 p.m. or 4 a.m. While a case might exist to properly delineate any appropriate limits for a knock and talk procedure, this is not it when the evidence demonstrates Defendant's consent was based on an (erroneous) belief that he had done nothing illegal, and the actions of the KANET members were rational and reasonable based on the information available to them at the time of the investigation.

Defendant cites numerous cases in support of his argument that the implied license to enter discussed by the Supreme Court in *Jardines* radically redefined the world of Fourth Amendment jurisprudence. Yet, as the majority opinion noted, all of the cases cited by Defendant were easily distinguished, in that they all involved *searches* of the curtilage of the home, not the officers actually knocking on the door and speaking to the occupants. Such conduct, even when banging on an apartment door as loudly as the officer could, was found permissible by the United State Supreme Court in *Kentucky v King*, 563 US 452, 456; 131 SCt 1849; 179 LEd2d 865 (2011). *Jardines* merely held that a *search* of the curtilage of a home without a warrant or other exception violated the Fourth Amendment. It did not overrule *King*'s determination that the police could knock on a person's door to try and speak with the occupant of a home (absent "no trespassing" signs or comparable indications), even if part of the motivation for trying to speak to the occupant was to gather information.[3]

Defendants attempt to have this Court impose a bright-line rule that prohibits police seeking voluntary consent to interview a person or to search a premises after daylight hours, or

[3] As the majority in *Jardines* stated: "What *King* establishes is that it is not a Fourth Amendment search to approach the home in order to speak with the occupant, *because all are invited to do that.* The mere 'purpose of discovering information,' *post*, at 1434, in the course of engaging in that permitted conduct does not cause it to violate the Fourth Amendment. But no one is impliedly invited to enter the protected premises of the home in order to do *nothing but conduct a search.*" 133 S Ct at 1416, n 4 (emphasis added to last sentence).

some other unspecified time frame should be rejected for its lack of grounding in what the Fourth Amendment actually covers, but also because it is unworkable in reality. Such problems are easily seen if one applies his proposed rule to other circumstances. Imagine if the police are called by a person who thought he heard gun shots fired from the home next door. If it is after 10 p.m. or midnight, Defendant's proposed rule would not permit the police to approach the front door of the home from which gun shots were reported and knock to see if anyone answers, because Girl Scouts and traveling evangelists do not knock on the door of a home at that hour. Or imagine that the police are called to a home by a person and told by the homeowner that a masked subject shot at him and fled out the back door. If the police were able to follow tracks in the snow to another house, under Defendant's rule, the police could not knock on the door of that home, if it is 2 a.m., to see if the homeowners know there might be someone inside, because neither Girl Scouts nor a traveling evangelist would knock on the door at that hour. Under Defendant's proposed bright-line rule, such an inquiry would need to wait until 7, 8, or 9 o'clock the following the morning, unless the police got a search warrant. Defendant's rule would require that the police engage in a higher standard of care for consensual encounters, creating an ultra-reasonableness requirement for non-searches and seizures even though the Constitution only imposes a reasonableness requirement for actual searches and seizures. One final hypothetical to drive the point home on the unworkability of Defendant's mis-interpretation of *Jardines*: the police are called to the scene of a murder at 4 a.m. Under Defendant's rule, the police would be prohibited from conducting a canvas of the neighborhood, knocking on doors to see if anyone saw or heard anything suspicious. Certainly an officer conducting such a canvas of the neighborhood would also be looking for suspicious behavior, bloody clothing, or other evidence while speaking with the various neighborhood residents, but Defendant's proposed rule would not permit any follow-up until

whatever is defined as a "reasonable" time of day. Because Defendant is seeking a ruling of constitutional import, it cannot vary depending on the severity of the crime; the Fourth Amendment applies equally to an investigation of a misdemeanor retail fraud as to a mass murder. Defendant's proposed rule was correctly found to be beyond the scope of the Supreme Court's decision in *Jardines*, and there is no reason to grant leave to appeal and consider a rule that would expand the Fourth Amendment's reasonableness requirement beyond searches and seizures to mere citizen encounters.

For the reasons stated above, those contained in the attached brief, and the holdings of the majority in the Court of Appeals, the People respectfully request that Defendant's application for leave to appeal be DENIED.

Respectfully submitted,

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Dated: March 7, 2016

By: /s/ James K. Benison
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